RECIPIENT LIABILITY UNDER THE TORRENS SYSTEM:
SOME CATEGORY ERRORS

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I INTRODUCTION

The High Court’s recent decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ranges widely over a number of equitable doctrinal areas. They include establishing the proper scope of a fiduciary relationship, breach of fiduciary duty, consent as a defence to a claim for breach of fiduciary duty, liability under both so-called ‘limbs’ of *Barnes v Addy* for receiving property in breach of duty and for assisting in the commission of the breach, and the application of the Torrens system of title registration to actions for the specific recovery of land. But the analysis of all these issues is secondary to the firm views expressed by the High Court as to the inappropriateness of intermediate courts of appeal in developing the law in cases where the arguments on both sides have been presented in terms of established principles and where no argument has been put that those principles should be modified.

The purpose of this paper is not to examine the dicta on the requirements for imposing liability on accessories to a breach of fiduciary duty. The dicta will not quell academic discussion, but the terms of the debates on the nature of ‘recipient liability’ and ‘assister liability’ are well known. The thesis of this paper is that the recovery of property ‘in specie’ had nothing to do with *Barnes v Addy*. *Farah* was not a case on ‘knowing receipt’ of property in breach of fiduciary duty, as the New South Wales Court of Appeal supposed, or of ‘knowing or dishonest assistance’, a possibility considered and rejected by the High Court. Moreover, *Farah* is only the latest in a line of recent Australian cases which have misconceived claims to the recovery of specific property as *Barnes v Addy* cases. Where the property in question is governed by ‘general law’, in other words property other than land, the right question to ask is whether the recipient received the property with notice of the prior breach of fiduciary duty. Real property is of course different: the principles of

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1 [2007] HCA 22 (24 May 2007) (‘*Farah*’).

2 (1874) LR 9 Ch App 244.

3 Since the High Court found at [108] that the appellant Farah had satisfied any fiduciary obligations of disclosure the subsequent discussion of accessory liability might be considered obiter. But this would be a mistake. The *ex cathedra* nature of the pronouncements on these issues make clear that even if they do not formally constitute the *ratio decidendi* of the decision they are intended to be applied by all courts below the High Court itself.

4 As well as *Farah* they include *Koorootang Nominees Pty Ltd* [1998] 3 VR 16 though note the discussion at 113-14 of whether a preserved equitable interest in the shares can be enforced, *Robins v Incentive Dynamics Pty Ltd* (in liq) (2003) 175 FLR 286 and *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133. The judgments in *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517 consider both the ‘knowing receipt’ liability, and ‘notice’ heads of liability discussed in this paper (at 548-9 Murray J, 554 Anderson and Steytler J). Both *Macquarie* and *LHK Nominees* were approved by the High Court ([2007] HCA 22 [196]) on the basis that they are ‘knowing receipt’ cases.
title registration transform the inquiry into an analysis of the limits of the principle of indefeasibility and the proper scope of its exceptions. Recipients of fiduciary wrongdoing will often succeed in disposing of the proceeds so that there is no property to be reclaimed. The first limb of *Barnes v Addy* provides a solution to these cases by enabling the beneficiary to recover the value of the property received. This is restitutatory in the sense of restoring the value of the benefit obtained by the recipient to the party who is entitled to that benefit and who has been deprived of it (the trustees, in the case of a trust, and otherwise the party to whom the fiduciary duty is owed). But where property, being the subject-matter of the fiduciary relationship, can be identified in the hands of the recipient the claim for its return ‘in specie’ will be governed by the principles of equitable title. Put simply, this paper argues: let property rights be enforced as property rights – and do not dress up the enforcement of property rights in the clothing of equitable doctrines which serve other purposes.

This paper is divided into three parts. The first establishes that the claim to the return of specific property to a trust fund or to a fiduciary who must apply it towards the fulfilment of the purposes of the fiduciary relationship, such as a joint venture, is a claim to enforce a pre-existing equitable interest in property. Its resolution will depend on whether or not the recipient is a good faith purchaser of the property for value without notice of the breach of duty. The second part demonstrates why the dispute in *Farah* relates to the enforcement of a subsisting equitable interest in property subject to the application of the doctrine of notice. The final part examines how the principles of title registration apply to the facts of *Farah*. It shows how, even if the disputed land had been transferred in breach of fiduciary duty, it would not have been recoverable. On this point the ‘title-based’ reasoning of this paper coincides with the *Barnes v Addy* reasoning of the High Court. But the barring of a proprietary claim to recover property should not prevent, in an appropriate case, a successful personal claim under the first limb of *Barnes v Addy*, based on the value of the property received.

II  THE PRESERVATION OF EQUITABLE RIGHTS FOLLOWING A BREACH OF TRUST OR OTHER FIDUCIARY DUTY6

The starting point for analysis is the core case of proprietary recovery from a transferee to whom a fiduciary, acting in breach of obligation, has conveyed property. Suppose that T, holding property on trust for B, in breach of trust conveys the legal title to R, the recipient, who is not a good faith purchaser for value without notice of the breach of trust. How is a claim brought by B (or perhaps by T2 who has been appointed by the court to replace the original delinquent trustee) for recovery of the property to be analysed? Three explanations of R’s obligation to restore the property can be found in the cases.7

5  This is clearly the case where the claim is made to the original property misappropriated. Whether the return of a traceable substitute for the original property enforces a pre-existing property right is contentious. See below n 24 and accompanying text.

6  This section is an expansion of Michael Bryan, ‘The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 327, 330-3.

A The Persistence of the Express Trust

The first explanation is that R holds the property on express trust for B, and as express trustee is bound by the equitable obligations which T assumed. The obligations are said, on this analysis, to persist through the later assumption of the legal title by R unless defeated by the successful assertion of the defence of good faith purchase without notice, or by some other bar to recovery such as the claimant’s delay in bringing the claim.

This is, at first sight, an unpromising explanation of R’s liability to restore the trust property. The settlor never expressed any intention to vest property in R as trustee, and R may well be deficient in the qualities required of a trustee of an express trust. It would be implausible, for example, to expect R to perform a trustee’s duty to invest trust monies. Why, then, clothe R with the indicia of an express trustee?

The answer is that equity does not classify the recipient as an express trustee in the sense of assuming the office of trusteeship, inclusive of all its rights, duties and powers. The fundamental duty is that of restoring the trust property to the trust. Mr Richard Nolan has recently shown that the beneficiary’s fundamental proprietary right under a trust is the negative one of excluding non-beneficiaries from the enjoyment of trust assets. This includes the power to prevent a recipient of the assets from using them for personal benefit. The correlative liability that this imposes on the recipient is that of restoring the property to the trust.

Some writers have expressed the view that the obligations imposed by the express trust continue to be enforceable against later recipients. For example, Maitland explained the recipient’s liability to make restitution of trust property in terms of the persistence of the original trust obligations unless and until destroyed by the application of the good faith purchase defence. But the proposition should be understood in the narrow sense proposed by Mr Nolan. It means no more than that the beneficiary has a power, enforceable by proprietary remedy, to prevent an unauthorised use of the trust property. The power imposes a corresponding liability on the recipient to restore the trust property. The statement does not mean that the recipient assumes all the obligations of trusteeship.

It was unnecessary in early equity to clarify the nature of the express trusteeship imposed on the recipient. The cases usually involved passive uses, which resembled the modern bare trust in imposing few obligations on the feoffee or trustee beyond the duty to preserve the trust estate and to convey it at the direction of the settlor. For practical purposes it did not matter whether the recipient was characterised as an express or constructive trustee, and if the recipient was held to be an express trustee there was little need to consider what duties the trusteeship entailed. The distinction arguably only became critical with the recognition of models of active

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8 Support can nonetheless be found for it in R Meagher and WMC Gummow, Jacobs’s Law of Trusts in Australia (6th ed, 1997) [1304] stating that ‘[w]hile the third party is often called a constructive trustee, he is more properly treated as one against whom the beneficial interest under the primary trust persists because he cannot set up a title as bona fide purchaser of the legal title without notice.’


10 F W Maitland, Equity: A Course of Lectures (1936) 82 (revised by J Brunyate).

11 See, for example, Anonymous YB 11 Edw IV, fol 8, pl 1.13 (1471), which contains possibly the earliest statement on recipient liability: ‘If my trustee conveys the land to a third person who well knows that the trustee holds for my use, I shall have a remedy in the Chancery against both of them; as well against the buyer as against the trustee; for in conscience he buys my land.’
trusteeship associated with the emergence of new types of wealth-holding trusts in the eighteenth century. Applying Mr Nolan’s thesis, statements such as those made by Maitland – who made them in that forum which positively invites oversimplification, namely student lectures – should be construed as a summary way of stating that the recipient must restore the trust property to the trustees, or to replacement trustees – so that the latter, and not the recipient, can perform the trust according to its terms.

In contrast to this analysis some American authorities would impose more onerous obligations on recipients – at any rate on recipients who take property with actual, as opposed to constructive, knowledge of the breach of trust. According to these authorities the recipient is obliged to perform all the obligations of an express trustee. On this view a recipient who knowingly receives the proceeds of a breach of trust is liable for failing to invest trust moneys, or for failing to invest prudently, on the same basis as an express trustee. These authorities do not contradict the analysis of recipient liability in the last paragraph, but they qualify it in a sensible respect. Many of the cases cited for imposing this more burdensome form of trusteeship are instances of trusteeship de son tort. This is a head of equitable liability imposed on the basis of a third party’s intentional exercise of control over trust property. It is artificial to treat a recipient as if he were in all respects an express trustee, but if, actually knowing that he has received trust property, the recipient fails to return it to the trust he cannot be heard to complain if he is made chargeable for the profit that would have accrued to the beneficiaries if timely restitution of the property had been made. To do so is not to characterise the recipient as an express trustee. It is simply to hold him liable to compensate the trust for losses incurred by reason of his role in preventing the proper performance of the trust.

B The Imposition of a Constructive Trust

The second explanation of R’s liability to restore the property to the trust is to say that he is a constructive trustee of the property. This was until recently the dominant analysis, perhaps justified by the reluctance of courts to characterise recipients as express trustees. According to this explanation the constructive trust is a proprietary remedy imposed over the property R has received. The trust is remedial in the sense that the only obligations imposed on the recipient are to reconvey the property to T (or to the replacement T) and to preserve the property pending reconveyance. This model of constructive trust must not be confused with constructive trusteeship under the first limb of Barnes v Addy. The recipient’s liability does not

13 Austin Wakeman Scott and Willam F Fratcher, Scott on Trusts (3rd ed, 1967) vol 4, § 291.2. See also Sarah Worthington, Equity (2nd ed, 2006) 189 suggesting that complex trust obligations can be imposed on recipients with actual knowledge of the trust.
14 Re Barney [1892] 2 Ch 265; Mara v Browne [1896] 1 Ch 199.
15 Cf the treatment of some constructive trustees as express trustees for the purposes of early limitations legislation: John Brunyate, Limitation of Action in Equity (1932) 50-9.
17 Muschinski v Dodds (1985) 160 CLR 583. See also Nolan v Collie [2003] VSCA 39 (rejecting the argument, on the facts, that the constructive trustee was entitled to exercise the right to indemnity available to express trustees).
depend on the beneficiary showing that the recipient had knowledge of the prior breach of trust. To the contrary, the onus rests on the recipient to prove that she is a good faith purchaser for value without notice of the breach. But, if not a *Barnes v Addy* mammal, what species of animal is this constructive trust? Maitland, writing of purchasers of trust property taking with notice of the fact that the sale was in breach of trust, located the purchaser’s liability within considerations of conscience: ‘as regards purchasers all is to depend on conscience. If you buy with notice, then in conscience it is my land.’ Scott, on the other hand, suggested that the liability of a purchaser rested on a different basis from that of the donee of the trust property, at least where the latter had no notice of the breach of trust. Agreeing with Maitland that a purchaser of property who had notice of the breach was bound in conscience to return the property to the trust, Scott rejected ‘conscience reasoning’ to justify the imposition of a constructive trust over property received by a donee with no notice of the breach. It was not ‘against conscience’ for the donee to retain the property, unless ‘conscience’ was invoked as an ex post rationalisation of the decision to compel restitution. The donee’s liability was instead justified in terms of the prophylactic prevention of unjust enrichment: ‘[t]he real reason why a donee of trust property takes subject to the trust is that otherwise he would be unjustly enriched. It would be unjust that he should profit by a wrong done by the trustee to the beneficiaries.’

C The Authorities

Taking stock at this point, and before turning to the third explanation of R’s proprietary liability, we should note that both models of proprietary liability described above are amply supported by authority. A well-known example of the constructive trust approach is the early decision of the High Court in *Black v S. Freedman & Co.* Black stole money from his employer and paid some of it into his wife’s bank account. The High Court held that the wife, being a volunteer, held the money on constructive trust for her husband’s employer. O’Connor J’s oft-cited and controversial dictum that ‘where money has been stolen, it is trust money in the hands of the thief’ aphoristically expresses the principle on which a constructive trust was imposed over the wife’s bank account. Two related features of the case deserve emphasis. First, the employment relationship between the plaintiff and Black was fiduciary although the High Court attached no special weight to that fact. Secondly, no attempt was made to argue in *Barnes v Addy* terms that the wife had ‘knowingly received’ the money in breach of fiduciary duty. It sufficed for the imposition of the constructive trust that she was a volunteer and therefore could not show that she was a good faith purchaser.

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18 F W Maitland, above n 10, 32.
19 Scott, above n 13, vol 4, § 284. The second sentence either betrays confusion between restitution for unjust enrichment and restitution for wrongs or deliberately shows a lack of concern for the significance of the distinction. For Peter Birks the distinction was of course crucial: see Peter Birks, ‘Misnomer’ in W Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 1.
20 (1910) 12 CLR 105.
21 Controversial because the trust reasoning was superfluous in *Black v Freedman*. The victim of the theft could have relied on his legal title which did not pass to the thief’s wife who was a volunteer in bad faith: *Ilich v R* (1987) 162 CLR 110, 138-9 (Brennan J). For a defence of *Black v Freedman* see John Tarrant, ‘Property Rights to Stolen Money’ (2005) 32 *University of Western Australia Law Review* 234.
Another example is the decision of the House of Lords in *Foskett v McKeown*.22 Investors had contributed to a trust fund to finance a property development. One of the trustees misappropriated money from the fund to pay some of the premiums towards a life assurance policy taken out for the benefit of his children. When exposure of his wrongdoing became imminent the trustee committed suicide, thereby entitling the children to a payment of just over £1 million under the policy. A majority of the House of Lords held that the investors were entitled to a proportionate share of the payment to the children representing the amount of trust money applied in paying the premiums.23

The decision answers, for the purposes of English law, some contested questions about the juridical basis of tracing.24 But its relevance for the present paper is to be found not in what it says about tracing but in how the tracing issues were presented. The children were not liable because they had ‘knowingly received’ the insurance payment purchased in part with the misappropriated trust money. To the contrary, they were liable on the straightforward ground that, being volunteers, they could not show that they were good faith purchasers of the insurance pay-out. The investors’ proportionate contribution to the pay-out belonged to the original express trust created for their benefit. In formal equitable analysis the investors’ proprietary rights as beneficiaries to exclude others from the enjoyment of the trust property extended to the children who came under a duty to restore to the trust a proportion of the money they had received, including some of the profit accruing from investment of that money.

Where B’s money has been mixed by T with his own money before payment to R the tracing rules complicate the analysis but do not alter its fundamental character. The House of Lords held in *Foskett* that in tracing their money into the insurance pay-out the investors were vindicating their pre-existing property entitlement to their share of the payment. The counter-argument that the investors had acquired a new right to that share by virtue of the law of unjust enrichment was rejected. The House’s conclusion on this point remains controversial.25 Arguments about the nature of tracing are in substance disagreements about how far the metaphor of the ‘persistence’ of an equitable interest can be pressed when that interest becomes merged with other interests. But where the original property is not substituted for other property, so that no tracing issues arise, the recovery of that property is a matter for the application of the principles of equitable property and not the law of unjust enrichment.

**D Recovery In Specie Under Barnes v Addy**

This brings us to the third explanation of B’s recovery from R. It is that B (or the replacement T) is entitled to recover the property from R provided that B satisfies the requirements of recipient liability under the first limb of *Barnes v Addy*. The relevance of *Farah* to the present argument is that it follows a consistent line of

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23 Lords Steyn and Hope dissented on the ground that the appropriate remedy was an equitable lien to secure repayment of the amount misapplied.
25 See the references, above n 24.
recent Australian authority in assuming that a successful *Barnes v Addy* claim for ‘knowing receipt’ entitles the claimant to the award of a proprietary remedy.\(^{26}\) It is unnecessary to examine all the cases which have applied this approach.\(^{27}\) An example of the recent trend of ‘Selbornising’ the recovery of property from recipients is the decision of the New South Wales Court of Appeal in *Robins and Others v Incentive Dynamics Pty Ltd* (in liq).\(^{28}\) The respondent company was formed for the purpose of marketing incentive schemes for employees of large companies. The directors formed another company, Coldwick, and authorised payment of the respondent’s money to Coldwick to enable that company to buy properties in South Melbourne and Crows Nest. The acquisitions conferred no benefit on the respondent, and the directors were held to have acted in breach of s 232(6) of the Corporations Law in making them.\(^{29}\) The New South Wales Court of Appeal held that the respondent’s liquidator was entitled to the benefit of a constructive trust over the properties acquired by Coldwick with the respondent’s money. The basis for the imposition of the trust was that the directors of Coldwick had received the purchase money for the properties with knowledge of the breaches of statutory duty committed by the directors of the respondent company and were therefore accountable on the basis of having ‘knowingly received’ property in breach of fiduciary duty. The constructive trust was described as a remedial constructive trust under the first limb of *Barnes v Addy*.\(^{30}\) Coldwick would have been held liable on any theory of recipient liability – whether based on knowledge, notice or unjust enrichment – because the directors of the two companies were substantially identical. But the significance of *Robins* for present purposes is that it illustrates the tendency of the recent Australian cases to prefer a ‘knowledge – based’ approach based on determining whether R knew of T’s breach of trust, rather than the ‘notice – based’ approach favoured by Maitland and Scott and supported by the older authorities. The *Robins* approach is less friendly to plaintiffs, who must show that R knew of the T’s breach of trust, than the property approach which places the onus on R to show that he is not a good faith purchaser for value without notice.

It is unclear why the framework of analysis in some recent cases has shifted from the enforcement of pre-existing equitable title to liability based on *Barnes v Addy*. The shift has not been justified, or even very much noticed, by the judges who have made it. Some possible justifications will be considered in the next section of the paper. But, generally speaking, it is surprising that Australian equity has embraced *Barnes v Addy* so enthusiastically as a basis for proprietary restitution. The doctrine of notice, which is the primary though not the only\(^{31}\) determinant of recovery of equitable property, was developed over five hundred years ago to in order to identify the circumstances in which beneficial interests under a trust will be destroyed by the trustee’s unauthorised conveyance of the trust property to a third party. It only assumed its final form after several centuries of Chancery litigation involving various categories of recipient of trust property – heirs and creditors, as

\(^{26}\) *Farah* [200].

\(^{27}\) See the authorities listed above n 4.

\(^{28}\) (2003) 175 FLR 286.

\(^{29}\) The provision forbids officers of a company from making improper use of their position to gain, directly or indirectly, an advantage for themselves or others or to cause detriment to others. It has since been replaced by s 182 of the *Corporations Act 2001* (Cth).


\(^{31}\) Equitable bars to recovery, such as laches, hardship and the ‘clean hands’ doctrine may also defeat recovery.
well as purchasers with notice of the breach and donees. The different versions of the doctrine of notice applied throughout the formative period of the doctrine reflected evolving ideas on where the compromise between beneficiary protection and the transferee’s power to deal with property as his own should be struck.32

If ‘notice’ is to be superseded by ‘knowledge’ in this area, or for that matter by strict liability for unjust enrichment33, lawyers should be told why the terms of the compromise need to be altered. Replacing the doctrine of notice by ‘knowing receipt’ liability shifts the balance in favour of recipients because the onus of proving knowledge rests on the beneficiary. This is also the effect, though for different reasons, of replacing notice liability by recovery based on unjust enrichment. The latter favours recipients who, if they cannot bring themselves within the safe harbour of the good faith purchase defence, may at least be able to establish a complete or partial defence of change of position.34 Either of these alternative “equitable moves” can be justified but so far neither, judicially at least, has been.

E Justifications

Two justifications for replacing the doctrine of equitable title by proprietary liability based on the Barnes v Addy jurisprudence can be suggested. The first is specific to the recovery of land. Dr Matthew Harding takes as his starting point the truism that Torrens legislation has abolished the doctrine of notice with respect to registered interests in land.35 The registered proprietor of an interest in Torrens land takes free from any prior interest affecting the land, including an interest under a trust, even if she has notice of it. An express trust of Torrens land cannot therefore be enforced against a subsequent registered proprietor on the basis of notice of the trust. It is possible, however, to make a proprietary claim to the land under the first limb of Barnes v Addy because such a claim arises subsequent to registration. The constructive trust is remedial in nature: being satisfied that the recipient is liable as an accessory to the breach of fiduciary duty and that a personal remedy is insufficient to achieve substantial justice the court makes a declaration that the property is held on constructive trust for the claimant.36

This analysis convincingly explains why claims to the recovery of trust land are determined within a Barnes v Addy framework. As claims to enforce pre-existing trust property they would be defeated by the principle of indefeasibility of title. As Dr Harding states, “[t]his is the most important sense in which it may be said that

33 Good faith purchase is a defence to a claim in unjust enrichment, but the addition of the defence of change of position, available to donees and purchasers who do not give full value for the trust property received, confers greater protection on recipients on the unjust enrichment version of liability than on the version based on equitable title.
34 The defence will defeat a claim to specific recovery ‘in specie’ where the recipient still has the property but has in good faith disposed of other property in reliance on the validity of the receipt.
35 Real Property Act 1886 (SA) ss 72, 186 and 187; Transfer of Land Act 1893 (WA) s 134; Real Property Act 1900 (NSW) s 43; Transfer of Land Act 1938 (Vic) s 43; Land Titles Act 1980 (Tas) s 41; Land Title Act 1994 (Qld) s 184(2)(a); Land Title Act 2000 (NT) s 188(2)(a).
[the recipient’s] title is indefeasible. 37 The analysis also explains why the constructive trust imposed in Robins v Incentive Dynamics was characterised as a remedial constructive trust. It is, however, on its own valuation a limited explanation. It explains why claims to specific restitution of land can only succeed if they are accommodated within a discretionary Barnes v Addy framework. Other reasons are needed to explain why claims to the recovery ‘in specie’ of other types of trust property, such as chattels and shares, are decided as ‘knowing receipt’ cases, and not by an application of the doctrine of notice.

A second possible justification for bringing proprietary claims within the scope of the ‘knowing receipt’ doctrine is that failure to do so would perpetuate an inconsistency between the personal and proprietary liabilities of the recipient. On the orthodox account of proprietary recovery, set out above, a recipient is strictly liable to return the property, or its traceable proceeds, unless he is a good faith purchaser or can establish some other bar to recovery. On the other hand, the personal liability of the recipient to repay the value of the property received requires the beneficiary to prove that the recipient had some knowledge of the breach of trust. The former places the burden on the recipient to show absence of notice of the breach; the latter places the onus on the beneficiary to show that the recipient knew of the breach. Rationality of legal principle would be promoted, so it is argued, by applying the same ‘knowledge’ test to both personal and proprietary restitution.

Arguments to remove structural incoherence in the law always deserve close consideration, the more so if, as in this case, the force of the argument applies to all forms of property, and not just to land. But in this case there is no reason to assume that the principles governing the return of property ‘in specie’ should be identical to the principles governing the personal liability of the recipient where the property can no longer be returned.

In the former case a plaintiff who proves that she has title to property which was misappropriated and that the property is now in the possession of the defendant has compelling reasons for requiring the return of her property.38 If the claimant’s title is equitable the claim will be defeated only by the defendant’s successful assertion of the defence of good faith purchase or by showing some other equitable bar to recovery. For civilian lawyers this is a relatively simple matter of vindicating title to property; but common lawyers achieve vindication through the established common law and equitable actions for the recovery of property.39

Where the defendant no longer has title to the property, perhaps because it has been consumed or sold to a good faith purchaser for value without notice of the plaintiff’s claim, no question of vindication arises. The plaintiff’s personal claim to restitution of the value of the property received by the defendant will be balanced against the latter’s honest belief that he was entitled to deal with that property as his own. Where the return of specific property is not in issue the defendant’s interest in

37 Ibid.
38 The logic of a proprietary claim in unjust enrichment is similar to an equitable proprietary claim. Both rely on the moral force of the assertion: ‘You have my property. Give it back.’ The differences are that (1) the equitable proprietary claim is based on the claimant’s pre-existing title to property, whereas the claim in unjust enrichment is based on a title which has passed to the defendant and which should, for a legally approved reason, be restored to the claimant, and (2) the defence of change of position is available to a claim in unjust enrichment but not to an equitable proprietary claim. The second difference is a logical consequence of the first in that it protects the recipient’s interest in dealing as absolute owner with property to which he has title.
39 In the case of chattels the return of the chattel will only be possible if the specific requirements for specific restitution in a claim for detinue are met.
security of receipt is valued more highly. Argument rages, of course, as to whether the balancing of interests is better effectuated by an inquiry into the state of the defendant’s knowledge or by an application of the law of unjust enrichment. But that disagreement must not be permitted to deflect attention from the proposition that property wrongfully received must be returned to the title-holder unless the recipient can establish a valid common law, equitable or statutory defence. The obligation to restore property ‘in specie’ is strict, whatever may be the case where a personal claim is brought against a recipient of that property.

III FARAH CONSTRUCTIONS PTY LTD V SAY-DEE PTY LTD.

This paper has so far considered the principles governing the recovery of trust property the legal title to which has been conveyed by the trustee to a recipient. Farah did not involve a claim to recover trust property, but like the cases discussed earlier, the reasoning assumed that the recovery of specific property was a matter for Barnes v Addy jurisprudence.

The facts of Farah, as ultimately found by the High Court, were as follows. Say-Dee and Farah entered into an agreement to develop a property. The property was purchased by the parties as tenants in common. Say-Dee provided part of the purchase price, the balance being paid from a bank loan secured by a mortgage over the property. Farah was controlled by Elias, a real estate developer. The agreement created a joint venture agreement which was conceded to be fiduciary in character. Farah’s development application lodged with the council was refused on the ground that the site was too narrow for the proposed development. Council officers informed Elias that the development potential of the property could only be realised if it were to be amalgamated with other sites. This information was later included in the council’s official Notice of Determination which Elias forwarded to Say-Dee. Elias then arranged for two adjoining properties to be purchased. The title to one of the properties was taken in the name of a company controlled by Farah. Units in the other property were purchased by Elias, his wife and their daughters, all of whom contributed to the purchase price. Say-Dee claimed that Farah had acted in breach of fiduciary obligation in not passing on to Say-Dee the information that the original property could be redeveloped if adjoining properties were to be purchased, and in not giving Say-Dee an opportunity to invest in the adjoining properties as part of the joint venture. In addition, Say-Dee argued that Mrs Elias and the daughters were liable in equity to return to Say-Dee its share of the properties they had received on the basis that they had received property in breach of fiduciary duty under the first limb of Barnes v Addy.

The New South Wales Court of Appeal, reversing some of the findings of fact made by the trial judge as well as drawing different inferences from the findings, held that Farah had acted in breach of fiduciary duty in not notifying Say-Dee of the advice it had received from the council to amalgamate the original property with adjoining properties and in not offering Say-Dee the opportunity to invest in the adjoining properties. It went on to hold that Mrs Elias and the daughters were liable to Say-Dee for having received property in breach of fiduciary duty, either because Elias’s knowledge in purchasing the properties in breach of fiduciary duty was to be imputed to them as principals, or because they were strictly liable in unjust

40 A third property, not adjoining the original property, was also purchased but was conceded not to be within the scope of the joint venture.
enrichment to return to Say-Dee the share of the proceeds of sale of the properties to which the latter was entitled under the terms of the joint venture agreement. The Court of Appeal imposed a constructive trust over the properties and appointed a receiver to sell the properties and to divide the proceeds between the Say-Dee and Farah interests.

On Farah’s appeal to the High Court it was held that Farah was under a fiduciary duty to disclose to Say-Dee the council’s advice that amalgamation of the original property purchased with adjoining properties was necessary in order to maximise the development potential of the former, and that the adjoining properties were available for purchase. But the High Court concluded that Farah had made sufficient disclosure to Say-Dee of the advice it had received from the council. Moreover, Say-Dee could, on the basis of its own business experience, assess the development opportunities of which advantage could be taken on the basis the council’s advice. Say-Dee was held to have given its informed consent to the purchase by the Farah family interests of the adjoining properties.

The conclusion that Farah had not committed a breach of fiduciary duty meant that it was not, strictly speaking, necessary for the High Court to consider the accessory liability of Mrs Elias and the daughters. In view of the significance attached by the Court of Appeal to the issue, however, the High Court proceeded to review these aspects of the decision. The High Court held that Mrs Elias and the daughters were not liable under the first limb of *Barnes v Addy* for having ‘knowingly received’ the units in one of the properties in breach of fiduciary duty. They had not received trust property. Even if the information Elias had received had been confidential, which was doubted, it would not constitute property for the purposes of imposing equitable liability for receipt under *Barnes v Addy*. Moreover, the family members could not be held liable on the basis that the knowledge of Elias, as agent, could be imputed to the other members of the family on whose behalf he had been acting. There was no evidence that Elias had purchased the properties as the agent for other members of his family; those family members bought their interests in the properties for themselves. The High Court went on to reject the imposition of recipient liability on the basis of unjust enrichment because, in addition to the fact that it had been neither pleaded nor argued, that basis of liability did not represent the law in Australia.41

Turning to other potential paths to liability, the High Court also held that Mrs Elias and the children were not liable for having assisted in the commission of a breach of fiduciary duty because they had not participated ‘in a significant way’ in any breach of fiduciary duty committed by Elias, and because they had no ‘actual knowledge of the essential facts which constituted the breach.’42

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41 Dicta in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 410, Stephen J with whom Barwick CJ concurred, and at 396, Gibbs J, were held to constitute the authoritative exposition of the principles of recipient liability. These dicta were said at [134] to impose a ‘notice’ test, but the High Court did not clarify what ‘notice’ or ‘knowledge’ means for the purpose of imposing liability under first limb of *Barnes v Addy*. Contrast [177] where a full explanation of ‘knowledge’, in terms of the well known Baden Delvaux taxonomy of knowledge, is provided for the purposes of the second limb of *Barnes v Addy*.

42 See [180]. The High Court reserved to itself for a later occasion any consideration of whether a test of liability based upon the dishonesty of the assister should be introduced in Australian law, in line with a series of Privy Council and House of Lords decisions beginning with *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. See *Farah* at [164]. But the High Court departed from one aspect of *Tan* in requiring ‘any breach of trust or breach of fiduciary duty relied upon [to] be dishonest and fraudulent’: *Farah* [179]. Compare *Tan* [1995] 2 AC 378, 384-5.
The ground of liability considered was a tracing claim. An argument that Say-Dee was entitled to trace the profits made by Elias from a breach of fiduciary duty into the units purchased by Mrs Elias and the daughters foundered on the evidence that they were purchasers for value without notice of the breach, and not volunteers.\footnote{Farah [188].}

\section*{IV \  Analysis}

There is clearly a great deal of meat in \textit{Farah} on all aspects of fiduciary law. It will all have to be marked, learned and inwardly digested by equity lawyers. And this is in addition to pronouncements on the proper role of intermediate courts of appeal, and of the High Court itself, in applying and developing the common law of Australia intended for judges and practitioners in all branches of the law. But the focus of this paper is on a relatively narrow part of the decision. The High Court found that Farah had not acted in breach of fiduciary obligation. Let us assume, as the High Court did in its analysis of the potential liability of Mrs Elias and her daughters, that Farah, acting through Elias, had committed the breaches of fiduciary alleged by Say-Dee. Would Say-Dee’s recovery of the properties purchased in breach of obligation depend, by application of the first limb of \textit{Barnes v Addy}, on whether the family members had ‘knowingly received’ the properties in breach of fiduciary obligation? It is suggested that it would not. Liability under the first limb of \textit{Barnes v Addy} is personal. To apply this head of liability to the recovery of property risks confusion with the application of the doctrine of notice, as that doctrine applies to equitable title. This can be demonstrated by an examination of the following hypothetical examples.

The first is a model case of a breach of fiduciary duty. Suppose that Elias, acting in breach of his duty to offer Say-Dee an opportunity to buy properties where the purchase would have properly fallen within the scope of the joint venture, had bought the properties from a third party and taken title to them in his own name, or in the name of companies he controlled. In this example, as the High Court noted, there is no objection to requiring Elias to hold the properties on constructive trust for Say-Dee.\footnote{Farah [110].} It is irrelevant that Say-Dee never had legal title to the properties. In equity they belong to Say-Dee.\footnote{Cook v Deeks [1916] 1 AC 554. See the discussion in R Meagher, D Heydon and M Leeming, \textit{Meagher Gummow and Lehane’s Equity: Doctrines and Remedies} (4th ed, 2002) [5-140].} It is, admittedly, not an easy question to identify the basis of the principal’s equitable title in such a case. On one view this is a legitimate application of the otherwise controversial maxim that ‘equity considers as done that which ought to be done.’\footnote{The application of the maxim to justify the imposition of a constructive trust over properties acquired with the proceeds of a bribe in \textit{A-G for Hong Kong v Reid} [1994] 1 AC 324 elicited the predictable and justified disapproval of Peter Birks in ‘Property in the Profits of Wrongdoing’ (1994) 24 \textit{University of Western Australia Law Review} 8.}

The next hypothetical is to suppose that Elias had purchased the properties in the circumstances specified in the first example but had then placed title to the properties in the name of Mrs Elias and their daughters. The diversion of the title to the third parties is surely not a material difference. The principles governing the situation of a fiduciary who, acting in breach of duty, takes title to property in the name of members of his family should be identical to the principles applicable to a
fiduciary who takes title in his own name. The family members in this example are volunteers. As in the first example Say-Dee, the party to whom the fiduciary duties are owed, has equitable title to the properties which is enforceable against the recipients, not by an invocation of *Barnes v Addy*, but because Mrs Elias and the daughters, on whom the burden of proof lies, cannot establish the defence of good faith purchase. If it is accepted that a principal has equitable title to the properties in the first example, when the fiduciary has taken the legal title in his own name, then it must also be accepted that the principal has equitable title which can be enforced against the family members in the second example.

The final hypothetical brings us closer to the facts of *Farah*, assuming that a breach of fiduciary duty had actually been committed in that case. Suppose that Elias had committed a breach of fiduciary duty in not bringing the opportunity to purchase the properties to the attention of Say-Dee. But in this scenario the purchasers of the properties are not Elias but his wife and daughters. Can Say-Dee recover the properties from the members of the fiduciary’s family? On these facts the family members, as in *Farah*, can show that they are good faith purchasers for value without notice of the breach. But even in the absence of good faith Say-Dee’s claim to enforce its equitable title to the properties will depend on proof of two matters. The first concerns the breach of fiduciary duty. The critical question here concerns the nature of the fiduciary’s obligation of disclosure. Fiduciaries are not subject to any ‘general’ duty to disclose material facts to the principal: the duty is only to disclose facts giving rise to a conflict between the fiduciary’s personal interest and the duty owed to the principal. The court must be satisfied that Elias had an interest in the purchase of the properties even though he was not the purchaser. This will be the case, for example, if it can be shown, for example, that he intended to assist the purchasers in redeveloping the properties. The second matter concerns causation. The principal must show that the wife and daughters only bought the properties as a result of receiving the information from Elias. If both matters can be proved, the principal will recover the properties unless defeated by an application of the good faith purchase defence. Once again *Barnes v Addy*, which places the onus on the principal to prove that the recipient of property had knowledge of the breach of duty, is irrelevant.

V THE APPLICATION OF TORRENS PRINCIPLES TO SAY-DEE

Even if the arguments in the previous part are accepted they can be criticised on the ground that they resemble a production of Hamlet without the Prince of Denmark. For they take no account of the fact that title to the properties in dispute in *Farah* had been registered under the Torrens system of title registration. Mrs Elias and her daughters had obtained indefeasible title to them upon registration. It is a cornerstone of the Torrens system of title by registration that the doctrine of notice does not apply to registered proprietors, who are therefore not bound by trusts

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47 This is of course in contrast to the family members in *Farah* who were good faith purchasers: *Farah* [72], [188].

48 *Farah* [188].

49 Parker v McKenna (1874) LR 10 Ch App 96; *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443. For a discussion of the sources of the fiduciary’s interest, for the purposes of a determining the existence of a conflict of interest see Matthew Conaglen, ‘The Nature and Function of Fiduciary Loyalty’ (2005) 114 *Law Quarterly Review* 452.
affecting the land at the time of registration. Say-Dee’s equitable interest under the constructive trust arising from Elias’s (assumed) breach of fiduciary obligation was therefore defeated by the recipients’ registered title unless an exception to indefeasibility applied. As Dr Harding has pointed out, ‘knowing receipt’ analysis has been applied to these title-based claims precisely because it offers plaintiffs the most promising pathway to circumvent the obstacle of indefeasibility. It is therefore necessary to consider this aspect of Say-Dee’s claim. The argument here is that, even if the dispute in Farah is conceptualised as being one of the enforcement of a pre-existing equitable title to the disputed properties, no exception to indefeasibility would have enabled Say-Dee’s claim to succeed. On this issue the analysis of the High Court is correct. But this should not have ended the analysis. Say-Dee should have been entitled to a personal claim against Mrs Elias and her daughters, again assessed at the value of the properties received, under the first limb of Barnes v Addy.

The New South Wales Court of Appeal held that Say-Dee’s ‘personal equity’ to recover the disputed properties, based on their successful claim based on the first limb of Barnes v Addy, defeated the indefeasible title to the properties obtained by the wife and children upon registration. There is a great deal of confusion about the meaning of ‘personal equities’ in this context. Indeed, the term itself is confusing since it to the successful assertion of a proprietary ground of recovery of land which can be based on legal, equitable or statutory rights. It therefore has nothing to do with personal remedies in equity.

Analysis of the ‘personal equities’ exception to indefeasibility routinely begins with the citation of the passage in Lord Wilberforce’s Privy Council opinion in Frazer v Walker where he states that the indefeasibility principle ‘in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity, for such relief as a court acting in personam may grant.’ The dictum has not been understood to mean that all legal and equitable claims affecting property are enforceable against an indefeasible title. The interests protected by the in personam exception fall into two classes.

The first consists of legal or equitable interests created by the registered proprietor with the intention that they should be enforceable against the registered title. For example, a proprietor who declares himself trustee of his land will burden his title with the equitable interest he has created, and the beneficiary will be entitled to enforce her rights against the proprietor, including the right to call for a transfer of the land to her, or to another party at her direction, if she is absolutely entitled to the land under the trust. Say-Dee obviously did not obtain an interest in the properties by virtue of this kind of legally constitutive act on the part of the registered proprietors.

The second consists of equitable interests imposed by court order in response to conduct on the part of the registered proprietor with respect to the land which is held to entitle the plaintiff to proprietary relief. As Wilson and Toohey JJ stated in Bahr v Nicolay (No2), indefeasibility does ‘not protect a registered proprietor from the consequences of his own actions where those actions give rise to a personal equity in another.’ Under this head are to be found the various categories of proprietary

50 See above n 35 for the statutory provisions.
51 Harding, above n 36.
53 Including omissions. The conduct need not amount to fraud which constitutes a separate exception to indefeasibility.
54 (1988) 164 CLR 604, 638. The boundary between the two categories can be indistinct, as
constructive trusteeship, estoppels and miscellaneous equities such as the equity in *Yerkey v Jones*. \(^{55}\) Indeed, the fecundity of the equitable jurisprudence of *Baumgartner v Baumgartner*,\(^{56}\) as it applies to land, can only be explained as the application, usually implicit, of the ‘in personam’ exception to indefeasibility in these cases. It would be impossible to bring many of these ‘unconscientious denial of title’ cases within the fraud exception to indefeasibility, at any rate without severe conceptual distortion.

Statutory codifications of the ‘personal equities’ exception embraces both categories of case. For example, the *Land Title Act 1984* (Qld) s 185(1)(a) provides that the registered proprietor holds subject to ‘an equity arising from the act of the registered proprietor’. These words are apt to include both expressly created and imposed interests affecting the proprietor’s registered title.\(^{57}\)

Say-Dee’s claim cannot be brought within either class of the ‘in personam’ exception. The wife and daughters did not assume any equitable obligation in favour of Say-Dee. Moreover, Say-Dee’s entitlement to equitable relief was not based on any conduct on the part of the Mrs Elias and her daughters who were in good faith and who had made financial contributions to the purchase of the properties. If the properties had been sold to them only because they had expressly acknowledged that registration of their titles would be subject to the proposed use of the property for the purposes of the joint venture the position would have been different. Indefeasibility would then have been rightly defeated by the application of the ‘in personam’ exception.\(^{58}\) But there was no evidence of any such conduct which might have disqualified them from the benefit of indefeasible title.

But Say-Dee’s failure to recover the properties should not have been the end of the story. Assuming that Elias had committed a breach of fiduciary duty, and that the properties had been acquired by the family members in consequence of the breach, Say-Dee should have been entitled to an award of equitable compensation against Farah, or against Elias as the controller of the company. Alternatively, Say-Dee should have been entitled to a personal remedy against Mrs Elias and the daughters under the first limb of *Barnes v Addy* for having received the properties in breach of fiduciary duty. It is precisely because a proprietary claim is barred, in this case by

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\(^{55}\) (1939) 63 CLR 649.

\(^{56}\) (1987) 164 CLR 137.

\(^{57}\) They are not, however, apt to cover the decision of the Queensland Court of Appeal in *White v Tomasel* [2004] 2 Qd R 438, convincingly criticized by Sharon Christensen and Bill Duncan, ‘Indefeasibility of Title a Bar to Restitution after Reversal of a Judgment on Appeal’ (2005) 11 Australian Property Law Journal 81. The decision of the Queensland Court of Appeal in *Tara Shire Council v Garner* [2003] 1 Qd R 556 is closer to the line, but in my view the dissenting judgment of Davies JA to the effect that there was no relevant ‘act of the registered proprietor’ for the purpose of applying s 185 (1)(a) is to be preferred to the majority decision on this point. Nonetheless, the High Court in *Farah* approved *Tara*: [2007] HCA 22, [194].

\(^{58}\) *Bahr v Nicolay* (No 2) (1988) 164 CLR 604.
reason of the statutory defence of indefeasibility, that personal relief comes into its own.

This naturally brings us to the question of the basis upon which a personal remedy will be granted. As a result of the High Court decision in Farah the imposition of equitable liability on recipients under Australian law requires proof of notice, or perhaps knowledge, of the breach of fiduciary duty. Although the imposition of liability on the basis of liability on the ground of unjust enrichment was rejected by the High Court, or at least placed out of bounds for lower court judges, the principle of restitution for unjust enrichment will not be eliminated simply by the re-assertion of fault-based liability in equity. Some of the cases on the equity side of the divide can be reconceived as common law claims to restitution, argued in the language of money had and received, upon proof of a recognised ground of restitution. It will be interesting to see if an unintended consequence of Farah turns out to be a ‘flight from equity’ to common law methods of legal characterisation. The underlying logical strength of the unjust enrichment idea is such that, even where it has been expelled by the front door, it re-enters from the back.

VI CONCLUSION

This paper argues that the High Court got Farah Constructions Pty Ltd v Say-Dee Pty Ltd wrong. This is not a simple disagreement on the proper basis of recipient liability under Barnes v Addy, although Farah will turn out not to be the last word on this important topic, and Peter Birks’s views may ultimately be vindicated.

But any debate about the nature and role of the first limb of Barnes v Addy should only be an argument about the conceptual basis for personal relief in equity against recipients. As far as the recovery of specific recovery is concerned the real objection to Farah is that it overlooks some verities of the law of equitable title.

59 Compare [2007] NSWCA 22 at [134] (‘the notice test of the first limb’) with [122] (‘knowledge’).